Supreme Court, U.S.
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No. 99-36

IN THE

Supreme Court of the United States

DAN MARCHI,

Petitioner,

v.

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF ALBANY, SCHOHARIE, SCHENECTADY, AND SARATOGA COUNTIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Whether BOCES had constitutional authority to regulate petitioner's communications with the parents of his students regarding the instructional program based upon a directive which precluded him from making reference to religion in his instructional program without prior supervisory authorization, after he repeatedly violated the Establishment Clause, was formally disciplined for his insubordination, and continued to violate the directive.

(2) Whether the courts below properly denied petitioner's motion to amend his complaint since BOCES has never taken or threatened action against petitioner for activities unrelated to his instructional program.

(3) Where the directive only relates to petitioner's instructional program, is reasonably clear, and has never been applied to interfere with petitioner's ability to practice his religion or engage in free speech in non-instructional contexts, is petitioner's alleged self-censorship beyond the confines of his instructional program, insufficient to comply with Article III standing requirements.

(4) Whether the issues petitioner seeks to litigate in his amended complaint are not sufficiently ripe where they involve hypothetical scenarios that have not yet occurred.

TABLE OF CONTENTS

	Page
Counterstatement of Questions Presented	i
Table of Contents	ii
Table of Authorities	v
Table of Appendices	xi
Constitutional Provisions Involved	1
Counterstatement of the Case	2
Petitioner Transforms His Class Into Parochial Education	2
BOCES Issues Directive	2
Co-Worker Complains Of Pervasive Teaching Of Religion	3
Social Worker Testifies As To Disruption Of Educational Program	4
Charges Filed Against Petitioner	4
Petitioner Found Guilty Of Insubordination	5
Petitioner Seeks To Continue To Pray And Counsel Students With Reference To God	5
BOCES Declines To Alter Directive	6

Contents

	Page
Petitioner Warned That Parental Communications Are Subject To Directive	7
Petitioner Admits Violating Directive After Suspension	7
Petitioner Initiates 42 U.S.C. § 1983 Action ...	7
Petitioner Seeks To Amend Complaint Based On Hypothetical Questions	8
Lower Courts Rule In BOCES's Favor	10
Reasons for Denying the Writ	11
I. This Case Does Not Involve An Unresolved Tension Between The Establishment Clause And The Free Speech And Free Exercise Clauses Of The First Amendment. Even If This Court Seeks To Construct A Framework To Resolve These Tensions, This Case Is Not The Right Vehicle To Do So.	11
A. Public School Teachers Are Subject To Greater Regulation	12
B. BOCES Has A Compelling Interest In Avoiding Establishment Clause Violations	13

Contents

Page

C. Parents May Understand Teacher Expression Has State's Imprimatur ... 16

D. Disruptive Workplace Doctrine Is Applicable Here 17

II. There Is No Conflict Between The Second Circuit's Decision Regarding The Appropriate Standard To Assess Whether There Is Sufficient Chilling Of Constitutional Rights To Establish Standing And Other Circuit Court Decisions Or Decisions Of This Court. 18

A. Petitioner Failed To Establish A Credible Threat of Enforcement 19

B. The Amended Complaint is Not Ripe . 23

III. It Would Be Inappropriate For This Court To Construct Constitutional Guidelines To Govern Teacher Communications With Students During Non-Instructional Time In Response To The Hypothetical Situations Petitioner Has Posited In His Amended Complaint. 26

Conclusion 28

TABLE OF AUTHORITIES

Page

Cases:

Abbott Laboratories v. Gardner, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967) 23

ACLU v. Florida Bar, 999 F.2d 1486 (11th Cir. 1993) 21

Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) 12

Altman v. Bedford Central Sch. Dist., 45 F. Supp. 2d 368 (S.D.N.Y. 1999) 15

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) 20, 21

Baggett v. Bullitt, 377 U.S. 360, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964) 22

Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991) . 17, 21

Board of Educ. of Westside Comm. Sch. v. Mergens, 496 U.S. 226, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990) 26, 27

Boring v. Buncombe County Bd. of Ed., 98 F.3d 1474 (4th Cir. 1996) *vacated by grant of reh'g en banc*, 1996 U.S. App. LEXIS 31165 (4th Cir. 1996), *different results reached on rehearing*, 136 F.3d 364 (4th Cir.), *cert. denied*, __ U.S. __, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998) 12, 16

Cited Authorities

	Page
Capital Square Review Bd. v. Pinette, 515 U.S. 753, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995)	27
Chandler v. James, __ F.3d __, 1999 U.S. App. LEXIS 15608 (11th Cir. 1999)	15
City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)	25
Doe v. Duncanville Ind. Sch. Dist., 994 F.2d 160 (5th Cir. 1993); subsequent appeal, 70 F.3d 402 (5th Cir. 1995)	15
Edwards v. Aguillard, 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987)	14, 26
Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962)	14
Epperson v. Arkansas, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968)	14, 24
Gardner v. Toilet Goods Assoc., 387 U.S. 167, 87 S. Ct. 1526, 18 L. Ed. 2d 704 (1967)	23
Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988)	16, 17

Cited Authorities

	Page
Helland v. South Bend Comm. Sch. Corp., 93 F.3d 327 (7th Cir. 1996), *cert. denied*, 519 U.S. 1092, 117 S. Ct. 769, 136 L. Ed. 2d 715 (1997)	15
Jager v. Douglas County Sch. Dist, 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989)	15
Keyishian v. Board of Regents, 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967)	22
Laird v. Tatum, 408 U.S. 1, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972), *reh'g denied by*, 479 U.S. 911, 107 S. Ct. 309, 93 L. Ed. 2d 284 (1986)	19, 20
Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993)	12, 14, 27
Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992)	13, 26
Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971)	12
Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 61 S. Ct. 510, 85 L. Ed. 2d 826 (1941)	19
McCollum v. Bd. of Ed, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948)	14

Cited Authorities

Page

New Hampshire Right to Life Political Action Comm. v. Gardner, 99 F.3d 8 (1st Cir. 1996) 21

New York State Club Ass'n v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988) 25

Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1993), *cert. denied*, 515 U.S. 1173, 115 S. Ct. 2640, 132 L. Ed. 2d 878 (1995) 14, 15

Pickering Bd. of Ed., 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) 18

Poe v. Ullman, 367 U.S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961), *reh'g denied by*, 368 U.S. 869, 82 S. Ct. 21, 7 L. Ed. 2d 69 (1961) 19

Roberts v. Madigan, 921 F.2d 1047 (10th Cir. 1990), *cert denied*, 505 U.S. 1218, 112 S. Ct. 3025, 120 L. Ed. 2d 896 (1992) 15

Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) 26, 27

School Dist. of Abington v. Schempp, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) 14

Silano v. Sag Harbor Union Sch. Dist., 42 F.3d 719 (2d Cir. 1994), *cert. denied*, 515 U.S. 1160, 115 S .Ct. 2612, 132 L. Ed. 2d 856 (1995) 17

Cited Authorities

	Page
Stone v. Graham, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980)	14
Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)	12
Tucker v. State of California Department of Education, 97 F.3d 1204 (9th Cir. 1996)	12, 16
Valley Forge Christian Coll. v. Americans United for Separation of Church and State, 454 U.S. 464, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982)	21
Virginia v. American Booksellers Ass'n, 484 U.S. 383, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)	22
Virginia v. American Booksellers Ass'n., 488 U.S. 905, 109 S. Ct. 254, 102 L. Ed. 2d 243 (1988)	23
Wallace v. Jaffree, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985)	14
Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993)	17, 25
Waters v. Churchill, 511 U.S. 661, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994)	13, 18
Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981)	12, 14

Cited Authorities

Page

Statutes:

20 U.S.C. §§ 1400, *et seq.* 16

20 U.S.C. § 4071[a] 27

42 U.S.C. § 1983 7

United States Constitution:

First Amendment 1, 7, 11, 12, 14, 15, 18, 19, 20, 22

U.S. Const., Art. III, cl. 2 ..... i, 1, 19, 20

Other Authorities:

Ethical Canon 7(b)(1)(a) 21

N.Y. Education Law § 3020-a (McKinney's 1995) 5, 18

TABLE OF APPENDICES

Page

Appendix — Excerpts From BOCES's Brief To The Second Circuit 1a

Respondent respectfully requests this Court to deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Second Circuit. Petitioner clearly violated the Establishment Clause, and the Board of Cooperative Educational Services for Albany, Schoharie, Schenectady, and Saratoga Counties ("BOCES") acted consistently with well established case law in restricting petitioner's religious proselytization of his students as well as regulating his communications with their parents about instructional matters. This case is not the right vehicle to announce a new framework to address the tensions between the Establishment Clause and the Free Exercise and Free Speech Clauses of the First Amendment. Nor is there any conflict between the Second Circuit's decision and settled case law on Article III standing and the alleged chilling of constitutional rights. Petitioner's amended complaint is not ripe for constitutional adjudication.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, cl. 2 of the United States Constitution provides in pertinent part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . . to Controversies" (U.S. Const., Art. III, cl. 2).

The First Amendment to the United States Constitution provides in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof; or abridging the freedom of speech. . . ." (U.S. Const., amend. I).

COUNTERSTATEMENT OF THE CASE

Petitioner Transforms His Class Into Parochial Education

Petitioner, a certified special education teacher of socially and emotionally disturbed high school students, transformed his classroom into parochial education, basing his teaching methods on his own dramatic religious conversion to Christianity (Pet. App. 3, App. 10, 241).[1] He modified his instructional topics to include forgiveness, reconciliation, and God (Pet. App. 3, App. 10). The mandated English curriculum was replaced with the Book of Psalms and King David's life which were taught in a religious manner (App 10, 242, 246). Petitioner began to pray with the students individually before, during, and after class (App. 10, 242, 243). He ignored his supervisor's informal entreaties to stop teaching religion (App. 148, 182).

BOCES Issues Directive

Accordingly, on September 14, 1995, John Daly, the Director of Special Education, issued a letter directive which provided:

> During our meeting last week, we discussed your frequent references to religion while dealing with students. As you know, public schools are prohibited from offering instruction in support of religious beliefs and practices. Your personal beliefs about the role of religion in society and its value to families and their children cannot be a part of the instruction given to your students.

---

1. References to " Pet. App." are to the Appendix to the Petition which includes the decisions below. References to "App." are to the Joint Appendix filed in the Second Circuit.

> Consequently, you are to cease and desist from using any references to religion in the delivery of your instructional program unless it is a required element of a course of instruction for your students and has prior approval by your supervisor, Dr. DiPierro. I am sure that you realize the seriousness of this matter and will comply with this direction.
>
> Best wishes for a good year at Mohonasen. If you have any questions or concerns, please let me know.

(Pet. App. 3-4).

Thus, contrary to petitioner's allegations (Pet. 3), he did not have explicit permission to teach religion prior to the directive. Moreover, even after the directive was issued, and he knew that it was prohibited, petitioner refused to comply because it "would be detrimental to his students and would violate his conscience before God" (Pet. App. 4, App. 11, 124-125, 247-248).

Co-Worker Complains Of Pervasive Teaching Of Religion

On February 10, 1995, a letter complaint was submitted to Dr. DiPierro by a teaching assistant in plaintiff's classroom (Pet. App. 4, App. 125). She indicated that petitioner used the Bible and God as the main subjects in his classroom (App. 409, 410, 553, 554). His techniques were similar to brainwashing techniques of a cult and he discussed Satanism, the devil, and students' possession by evil spirits (App. 553). She overheard petitioner tell his students that he was willing to lose his job over religious issues (App. 554).

Social Worker Testifies As To Disruption Of Educational Program

Charles Rhynhart, a social worker on petitioner's team, testified that all the posters in petitioner's classroom had religious themes (App. 381). Petitioner's conversations with students and co-workers routinely ended with "Praise God", or "I'll pray for you" (App. 381). Petitioner utilized religion, instead of the behavior modification approach followed by the school to address unacceptable behavior (App. 383-384). As a result of petitioner's proselytizing, some of petitioner's students told Mr. Rhynhart that he could not be their counselor unless he accepted God and Jesus as his savior (App. 385).

Charges Filed Against Petitioner

Following an investigation, BOCES initiated charges against petitioner on March 20, 1995, which included the following:

> (1) Conduct unbecoming a teacher in that the teacher expresses his personal views on religion to his students during class, incorporates his religious views into the discussion of academic subjects and distributed religious materials to students for instructional materials.
>
> (2) Insubordination in that the teacher has failed to comply with a written direction given him to cease and desist from using any references to religion in the delivery of his instructional program unless it is a required element of a course of instruction for his students and had been given prior approval from his supervisor.

(App. 57-58, 124, 551).

Petitioner Found Guilty Of Insubordination

A hearing was held before a Hearing Officer pursuant to N.Y. Education Law § 3020-a (McKinney's 1995). Petitioner (Pet. 4) implies that the Hearing Officer recognized the beneficial nature of his religious advocacy, and it was only the School Board that determined to suspend him and require him to comply with the directive as a condition to his returning to work. Petitioner's suspension and the requirement that he comply with the directive were based upon the Hearing Officer's official recommendations (Pet. App. 4, App. 66-67).

The Hearing Officer found that the directive was "clear and unequivocal" and that the import of the memo was unmistakable (App. 63). He further found that petitioner knowingly defied the directive in the face of unequivocal notice, constituting insubordination (App. 62-64). The Hearing Officer observed that petitioner was free to practice his religion and live his faith as he wished, and could refer to religion in the context of the regular curriculum (App. 64-66, 126).

Petitioner Seeks To Continue To Pray And Counsel Students With Reference To God

At the end of the sixth month suspension, Mr. Daly sent petitioner a letter stating that unless petitioner affirmed in writing that he would refrain from using any references to religion in the delivery of his instructional program without prior approval of his supervisor, he would not be allowed to return (App. 12, 69). Upon advice of counsel, petitioner affirmed in writing that he would adhere to the directive (Pet. 4, App. 70). Simultaneously, he sent a letter to Mr. Daly asking: (1) whether he could pray with a student if the student approached him and asked him to pray in private; and (2) whether and how he could answer a student's questions concerning religion and morality (App. 71).

BOCES Declines To Alter Directive

Mr. Daly responded as follows:

> As a condition of returning to work, you signed an affirmation committing yourself not to use any references to religion in the delivery of your instructional program unless it is a required element of an approved course of instruction and you obtain the prior approval of your supervisor.
>
> Based upon the fact that the disciplinary action against you resulted from your defiance of an identical directive rather than a misunderstanding, together with the fact that you had the opportunity to consult with counsel before you signed the affirmation, I must assume that you fully understood the terms of your affirmation, and that you will abide by them.

(Pet. App. 4-5, App. 72).

Shortly after his return, a teacher's aide saw a letter in petitioner's classroom addressed to a parent of a student which provided:

> Ryan had a good day today. I thank you and the LORD for the tape it brings the Spirit of Peace to the classroom. Tomorrow is the teacher's conference and dismissal is at 11:30. May God Bless you all richly!

(Pet. App. 5, App. 73).

Petitioner Warned That Parental Communications Are Subject To Directive

When Dr. DiPierro advised petitioner that DiPierro had been informed that petitioner had similar communications with other parents, petitioner explained that he did not interpret the directive to apply to any of his communications with parents (Pet. App. 5, App. 74). Dr. DiPierro warned petitioner by letter that "since you communicated these messages in your capacity as a BOCES teacher, and in as much as parents are part of the instructional process, my interpretation of the agreement you signed . . . precludes you from communicating in this manner" (Pet. App. 5-6). However, no action was taken against petitioner in connection with this incident (Pet. App. 6).

Petitioner Admits Violating Directive After Suspension

Petitioner has admitted that he continued to violate the directive in 1997 by making references to God during class and counseling students with reference to God (App. 247-248). He persisted in recommending that if students accepted Jesus Christ, they were more likely to overcome substance abuse problems (App. 248). Petitioner took the position that prayer was not a religious ritual, and that he prayed and counseled students as a friend, and not as a teacher, making the directive inapplicable (App. 219).

Petitioner Initiates 42 U.S.C. § 1983 Action

Petitioner subsequently initiated a 42 U.S.C. § 1983 action containing six causes of action, alleging violations of his First Amendment right to the free exercise of religion, free speech, academic freedom, and the Religious Freedom Restoration Act (App. 9-14). He challenged his transfer to the CDS class, alleging that he had been retaliated against

for exercising his constitutional rights (App. 13-14). He sought to void the directive, as well as the disciplinary action, obtain lost wages and benefits due to the suspension, and obtain an order enjoining BOCES from interfering with his constitutional rights, as well as attorneys' fees (App. 14). BOCES answered, denied the complaint, and moved for summary judgment (App. 100-102, 127-128).[2]

Petitioner Seeks To Amend Complaint Based On Hypothetical Questions

After discovery was completed, petitioner cross-moved for summary judgment, and sought leave to amend his complaint in order to expand his allegations relating to the directive's purported overbreadth and chilling of protected speech (Pet. App. 6). BOCES opposed the cross motion for summary judgment and for leave to amend the compaint. (App. 294-297, 309-316).

Petitioner's amended complaint included allegations that BOCES violated his First Amendment rights by interpreting the directive to constrain petitioner from communicating with students on matters unrelated to school curriculum both on school and off school grounds during non-class times (Pet. App. 6). Petitioner alleged that he had never received any guidance about the directive, and that his request for objective criteria had been summarily denied (App. 109). He further alleged that the lack of guidance prevented him from praying with students and co-workers, and answering students' questions with reference to God (App. 109). In his amended complaint, petitioner relied upon the deposition

2. Petitioner moved for a preliminary injunction to enjoin enforcement of the directive (App. 113-118). The District Court for the Northern District of New York (Scullin, J.) denied the motion, concluding that the meaning and scope of the directive were clear to a person of ordinary intelligence and that the directive was not vague or overbroad (App. 127-128).

testimony of Mr. Daly, who authored the directive, and Dr. Pierro, his immediate supervisor, to demonstrate that BOCES intended to apply the directive to curtail protected speech (Pet. App. 6, 63-66).

At his deposition, Mr. Daly testified that the directive was necessary in light of petitioner's repeated and pervasive use of religion in his instructional program, and his refusal to comply with repeated entreaties to comply with the school's constitutional mandate (App. 148). Daly defined the term instructional program to include "the actual teaching of content with the expressed intent of sharing curriculum content [and] context with students" (App. 160). He stated that the instructional program can occur outside the classroom, giving homework assignments as an example (App. 160). In his view, conversations between petitioner and his students which occurred on school grounds during or after school hours could constitute part of the instructional program even if the subject matter was not part of the mandated curriculum, depending on the circumstances (App. 161-163). When asked whether a conversation between petitioner and students about issues not directly related to the mandated curriculum could be part of the delivery of his instructional program, Mr. Daly was careful to couch his answer that "in his personal opinion, he believed that a teacher's influence is extended often beyond the parameters of the school day" (App. 163). Mr. Daly did not give any indication that he would take any action against petitioner for out-of-school interactions unrelated to the instructional program (App. 163). Mr. Daly was not asked about particular factual scenarios during the deposition.

Dr. DiPierro, petitioner's supervisor for eleven years, was also deposed. He worked closely with petitioner, both before and after his suspension, to delineate the parameters of the directive and afford petitioner guidance as to how petitioner could achieve values clarification in a secular

context (App. 182-184, 202-204, 216). Dr. DiPierro noted that the instructional program can occur off school grounds such as when students take a field trip or a teacher invites students over his or her house (Pet. App. 64-65). He testified that the instructional program includes more than the lesson plans based on mandated curriculum, and that communications to parents are fairly contained in the definition of instructional program (Pet. App. 65, App. 182-183).

Lower Courts Rule In BOCES's Favor

The District Court granted BOCES's motion for summary judgment and denied petitioner's motion for leave to amend his complaint, which was affirmed by the Second Circuit.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT INVOLVE AN UNRESOLVED TENSION BETWEEN THE ESTABLISHMENT CLAUSE AND THE FREE SPEECH AND FREE EXERCISE CLAUSES OF THE FIRST AMENDMENT. EVEN IF THIS COURT SEEKS TO CONSTRUCT A FRAMEWORK TO RESOLVE THESE TENSIONS, THIS CASE IS NOT THE RIGHT VEHICLE TO DO SO.

The petition does not warrant review by this Court. The Second Circuit applied settled law in holding that BOCES did not infringe petitioner's free exercise rights in restricting his religious expression to avoid Establishment Clause violations, finding that the challenged directive was neither vague nor overbroad. Significantly, petitioner has abandoned his claim that BOCES violated his constitutional rights when it disciplined him, in effect conceding that his conduct violated the directive, and could be restricted without implicating his constitutional rights.

Petitioner's application is predicated upon the erroneous premise that this case is an appropriate vehicle for this Court to develop a new framework for resolving a teacher's free exercise claims within the public school context. The directive only relates to petitioner's instructional program, and was properly upheld since public school officials have the authority to prevent teachers from giving students and parents the impression that the school prefers a particular religion or religion in general. The public forum analysis used to resolve free speech claims regarding private religious expression has no bearing here.

The petition is replete with factual omissions, improper references to case law that does not stand for what petitioner represents it to be (*see, e.g., Tucker v. State of California Department of Education*, 97 F.3d 1204 (9th Cir. 1996); (Pet. 13)), reliance upon legal analysis taken out of context, as well as citation to case law that has been vacated (*see, e.g., Boring v. Buncombe County Bd. of Educ.*, 98 F.3d 1474 (4th Cir. 1996); (Pet. 13), *vacated by grant of reh'g en banc*, 1996 U.S. App. LEXIS 31165 (4th Cir. 1996), *different results reached on reh'g*, 136 F.3d 364 (4th Cir.), *cert. denied*, __U.S.__, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998)). This is a sufficient basis to deny the petition.

A. Public School Teachers Are Subject To Greater Regulation

While the Second Circuit acknowledged that the directive unquestionably restrains petitioner's First Amendment rights, the Court recognized that the special nature of public educational institutions affords school officials comprehensive authority to prescribe and control conduct, and as well as providing them with a compelling interest in justifying the abridgement of free speech otherwise protected by the First Amendment (*Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993); *citing Widmar v. Vincent*, 454 U.S. 263, 271, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981)).

The Court began with the principles regarding the establishment-of-religion set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) and *Agostini v. Felton*, 521 U.S. 203, 234, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997). The Second Circuit was careful not to invalidate activity that has a primary secular purpose and only incidental religious significance. However,

it recognized that when government endeavors to police itself and its employees to avoid transgressing the Establishment Clause, it must be given some leeway, even if the activity is ultimately determined not to violate the Establishment Clause, and the actions would otherwise be protected if the individual involved were not a public employee (*cf.*, *Waters v. Churchill*, 511 U.S. 661, 671, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994) (plurality opinion)).

The Second Circuit concluded that since petitioner's letter addressed a matter directly related to his professional duties as a CDS teacher, it was within the directive's scope regarding the "delivery of [petitioner's] instructional program". The Court reasoned that while the letter was slight in its religious references, it sufficiently intruded religious content into a curricular matter, such that BOCES could reasonably be concerned that communications of this sort would expose it to non-frivolous Establishment Clause challenges. Accordingly, the application of the directive to parental communications about the instructional program did not impermissibly infringe petitioner's free exercise rights. The Court also rejected petitioner's claim that he was not on notice that such conduct violated the directive, since no action was taken, and he was merely warned that his communications with parents about instructional matters would be considered to be part of his instructional program.

B. BOCES Has A Compelling Interest In Avoiding Establishment Clause Violations

This Court has consistently struck down organized religious activities or school endorsement of religion (*see, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 112 S. Ct. 2649, 120 L. Ed. 2d 467 (1992) (schools prohibited from sponsoring invocations and benedictions at graduation where ceremony conducted by the school, it occupies an important place and school controls the program since even subtle or

indirect coercion of impressionable students may violate the Establishment Clause); *Edwards v. Aguillard*, 482 U.S. 578, 107 S. Ct. 2573, 96 L. Ed. 2d 510 (1987) (state statute mandating teaching of creation science held unconstitutional advancement of religious doctrine in violation of the Establishment Clause); *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985) (state statute authorizing one minute period of silence to encourage prayer in public schools invalidated); *Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L. Ed. 2d 199 (1980) (posting of Ten Commandments on public school wall violated the Establishment Clause); *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968) (statute prohibiting teaching of evolution invalidated as violative of the Establishment Clause); *School Dist. of Abington v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963) (statute mandating daily reading of Bible and recitation of Lord's Prayer held unconstitutional); *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962) (non-denominational prayer recited in the classroom held unconstitutional); *McCollum v. Bd. of Ed*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948) (religious instruction which had been carried out for a certain period each week invalidated)).

Thus, BOCES has a compelling interest in avoiding Establishment Clause violations which justifies the abridgement of plaintiff's free exercise, freedom of association, and free speech claims otherwise protected by the First Amendment (*see*, *Lamb's Chapel v. Center Moriches Union Free School District*, *supra*, at 394, *quoting*, *Widmar v. Vincent*, *supra*, at 271).

Students should not be given the impression that the school officially sanctions or prefers religion generally, or a specific religion in particular (*see*, *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1993), *cert. denied*, 515 U.S. 1173, 115 S. Ct. 2640, 132 L. Ed. 2d 878 (1995)).

Accordingly, school officials have the authority to prevent public school teachers from expressing their religious viewpoints, or praying with or in the presence of students both in the classroom and in comparable settings (*Helland v. South Bend Comm. Sch. Corp.*, 93 F.3d 327 (7th Cir. 1996), *cert. denied*, 519 U.S. 1092, 117 S. Ct. 769, 136 L. Ed. 2d 715 (1997); *see also*, *Chandler v. James*, __ F.3d __, 1999 U.S. App. LEXIS 15608 (11th Cir. 1999) (teacher participation in student-initiated prayer improperly entangles the State in religion and signals an unconstitutional endorsement of religion); *Peloza v. Capistrano Unified Sch. Dist.*, *supra*, (court sustained directive which precluded teacher from discussing his religious beliefs during instructional time whether inside or outside of the classroom); *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), *cert denied*, 505 U.S. 1218, 112 S. Ct. 3025, 120 L. Ed. 2d 896 (1992) (court upheld restriction of teacher's reading Bible to himself in front of class, as well as use of poster which requested readers to open their eyes to see the hand of God); *Doe v. Duncanville Ind. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993); *subsequent appeal*, 70 F.3d 402 (5th Cir. 1995) (unconstitutional for coach or other school official to initiate, lead or participate with a team in prayer, or to ask a team member to do so before, during or after a public or school sponsored athletic activity or event); *Jager v. Douglas County Sch. Dist*, 862 F.2d 824 (11th Cir. 1989), *cert. denied*, 490 U.S. 1090, 109 S. Ct. 2431, 104 L. Ed. 2d 988 (1989) (invocations by clergy at public officials' request prior to public school football game held unconstitutional); *Altman v. Bedford Central Sch. Dist.*, 45 F. Supp. 2d 368 (S.D.N.Y. 1999) (court enjoined various teaching activities, as well as the sale of worry dolls in the school store, which were found to violate the First Amendment rights of students since teachers and speakers sponsored by the school must remain neutral towards all religions, neither sponsoring nor disparaging any religious beliefs)).

Tucker v. California, *supra*, upon which petitioner relies, is not to the contrary. In *Tucker*, the Ninth Circuit held that the public employer had failed to justify a broad order *applicable to all employees* which prohibited them from displaying any religious materials in any part of the workplace other than their closed offices or defined cubicles, and engaging in any religious advocacy during work hours in the workplace. Since the government failed to establish that its interests justified the breadth of the ban, it was invalidated. However, the Court expressly distinguished the facts from a situation involving public school teachers (97 F.3d at 1212-1213).[3]

C. Parents May Understand Teacher Expression Has State's Imprimatur

The Second Circuit noted that this Court has recognized that parents may understand that certain expression by a teacher bears the imprimatur of the State (*see*, *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) (school district may regulate "expressive activities that students, parents or members of the public might reasonably perceive to bear the imprimatur of the school")). Petitioner's attempt to distinguish *Hazelwood* (Pet. 14-15) is predicated upon a simplistic, and unduly constrained concept of the instructional program involved in public education, and in particular, with special education provided pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq*.

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3. As noted, since the decision in *Boring v. Buncombe County Bd. of Ed.*, 98 F.3d 1474 (4th Cir. 1996) was vacated, and different results were reached after the rehearing *en banc* (*see*, 136 F.3d 364 (4th Cir.), *cert. denied*, __ U.S. __, 119 S. Ct. 47, 142 L. Ed. 2d 36 (1998), the *Boring* decision cited by petitioner is no longer good law.

Moreover, courts have applied *Hazelwood* to teachers' conduct as well as students' conduct since pedagogical interests are equally applicable to both (*see, e.g., Silano v. Sag Harbor Union Sch. Dist.*, 42 F.3d 719 (2d Cir. 1994), *cert. denied*, 515 U.S. 1160, 115 S .Ct. 2612, 132 L. Ed. 2d 856 (1995); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991)).

In any event, petitioner's attempt to dismiss the letter as private correspondence between two friends distorts the facts beyond recognition. No one rifled in his personal correspondence, and one does not usually advise friends in private correspondence that there is early dismissal from school or comment on a student's behavior in school. In addition, there was evidence that petitioner had similar communications with other parents, and viewed everyone as a friend when he was expressing his religious views (App. 219).

Thus, contrary to petitioner's contention (Pet. 12), this case does not involve a novel issue which affects the rights of hundreds of thousands of public employees. The letter did not simply involve the kind of adult to adult communication that occurs regularly in every public employment context.

D. Disruptive Workplace Doctrine Is Applicable Here

Petitioner also asserts that the disruptive workplace doctrine has no application to the case at bar, and that BOCES never even claimed that his conduct was disruptive (Pet. 13). This is simply untrue. BOCES previously argued that petitioner had undermined the behavior modification approach adopted by the team, and had either alienated or supplanted other professionals on the team raising serious problems for BOCES, in addition to raising legitimate

Establishment Clause concerns (BOCES's Brief to the Second Circuit, pp. 37-38 which can be found in the Appendix to Respondent's Brief in Opposition, App. 1a). Petitioner's § 3020-a hearing was also replete with testimony that demonstrated that petitioner's conduct had been disruptive (App. 125, 553, 554, 383-385). Under the *Waters v. Churchill* standard, courts examine whether the conduct impairs discipline, co-worker relations, impedes the performance of the employees' duties, or the operation of the enterprise (*see also*, *Pickering v. Bd. of Ed.*, 391 U.S. 563, 569-70, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)). The letter, which was only one aspect of the continuing problems caused by petitioner's conduct, cannot be viewed in isolation.

The Second Circuit's appreciation of the dilemmas facing public schools when teachers violate the Establishment Clause, and the difficulty of ascertaining the precise boundaries of the First Amendment rights of their employees, does not establish a precedent which will be cavalierly used to violate the constitutional rights of teachers or other public employees. It is only by divorcing the decision from its factual underpinnings, that petitioner can attempt to transform a reasonable decision which is consistent with precedent into a so-called vehicle of religious oppression.

II.

THERE IS NO CONFLICT BETWEEN THE SECOND CIRCUIT'S DECISION REGARDING THE APPROPRIATE STANDARD TO ASSESS WHETHER THERE IS SUFFICIENT CHILLING OF CONSTITUTIONAL RIGHTS TO ESTABLISH STANDING AND OTHER CIRCUIT COURT DECISIONS OR DECISIONS OF THIS COURT.

Petitioner has also failed to establish that the Second Circuit decision is squarely inconsistent with other Circuit Court

decisions or the decisions of this Court regarding the standards for establishing Article III standing in cases implicating First Amendment concerns. Petitioner has manufactured the conflict in order to meet the criteria for Supreme Court review. The Second Circuit properly concluded that petitioner failed to present evidence that his constitutional rights were reasonably chilled or that the case presented a ripe controversy regarding the hypothetical claims in his amended complaint.

A. Petitioner Failed To Establish A Credible Threat of Enforcement

The Court denied petitioner's request for leave to amend his complaint since Article III of the United States Constitution limits the jurisdiction of the federal courts to cases or controversies, *citing Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S. Ct. 510, 85 L. Ed. 2d 826 (1941)) for the proposition that

> [t]he question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, or sufficient immediacy and reality to justify judicial resolution.

The District Court refused to grant petitioner's motion to amend the complaint, concluding that petitioner's refusal to give a common sense meaning to the directive did not transform the directive into an unconstitutional infringement of his constitutional rights, or raise his allegations of chilling to constitutional proportions. Relying upon *Poe v. Ullman*, (367 U.S. 497, 503-508, 81 S. Ct. 1752, 6 L. Ed. 2d 989 (1961), *reh'g denied by*, 368 U.S. 869, 82 S. Ct. 21, 7 L. Ed. 2d 69 (1961)) and *Laird v. Tatum*, (408 U.S. 1, 12-13, 92 S. Ct. 2318, 33 L. Ed. 2d 154 (1972), *reh'g denied by*, 479 U.S. 911, 107 S. Ct. 309, 93 L. Ed. 2d 284

(1986)), the Second Circuit affirmed, finding that petitioner had failed to demonstrate a credible fear of enforcement even under the relaxed standards applicable to First Amendment litigation.

The determination of the Second Circuit that petitioner did not face a credible threat of enforcement for off campus activities is a factual determination which does not merit Supreme Court review. The Court found Mr. Daly's testimony to be ambiguous and qualified as his "personal opinion". It also relied upon the fact that BOCES never indicated that it intended to apply the directive to petitioner's off-campus expressive activities on matters unrelated to his instructional program. The Second Circuit noted that petitioner had not even alleged that BOCES had attempted to regulate his communications on matters unrelated to school even though he sought to challenge the regulation in this regard. Accordingly, petitioner's self-created censorship was not sufficient to create Article III standing, or sufficient chilling in the circumstances.

The Court's determination is not in conflict with established case law. Contrary to petitioner's contention (Pet. 17, 21), the Second Circuit did not graft a third requirement of the two part test of *Laird v. Tatum* (*supra)* by holding that a plaintiff must demonstrate that there has been actual enforcement of a directive to satisfy the Article III standing requirement. Rather, the Court determined that there was no credible threat of enforcement and no evidence that BOCES was going to enforce the valid directive in an unconstitutional manner. Speculative fears of prosecution are insufficient to establish standing (*Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)).

Petitioner concedes that in order to clear Article III standing, he must show that: (1) he has personally suffered

some actual or threatened injury as a result of the challenged conduct; (2) the injury can fairly be traced to the threatened conduct; and (3) the injury likely will be redresssed by a favorable decision from the court (*see, e.g., Valley Forge Christian Coll. v. Americans United for Separation of Church and State,* 454 U.S. 464, 472, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982); *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 12 (1st Cir. 1996)). Petitioner failed to establish that he suffered any concrete injury that is objectively traceable to any action of BOCES regarding new allegations in the amended complaint.

The cases upon which petitioner relies recognize that the difference between an abstract question and a "case and controversy" is one of degree which is not discernable by any precise test (*see, e.g., Babbitt v. United Farm Workers Nat'l Union, supra*). Each First Amendment case must be decided on its own merits (*Bishop v. Arnov, supra* at 1070), and none of the cases upon which petitioner relies (Pet. 19-22) are factually analogous.

For example, in *ACLU v. Florida Bar*, (999 F.2d 1486 (11th Cir. 1993)), the Court held that a candidate for judicial office had raised a serious likelihood of disciplinary action for violating an ethical canon where the state's Ethics Committee had issued an advisory opinion that plaintiff's proposed speech criticizing his opponent would violate Ethical Canon 7(b)(1)(a). Since the dispute involved a particular speech, the Court found that the plaintiff's self-censorship was sufficient to establish standing since there was a credible threat of enforcement. The issues were not hypothetical but were clearly defined. Here, the very opposite is true, which is a lynchpin of the Second Circuit's decision.

So too, *New Hampshire Right to Life Political Action Comm. v. Gardner* (*supra*) (Pet. 20), only addressed whether the plaintiff had personally suffered some actual or threatened

injury. There was a state statute which restricted election contributions to $1,000. The First Circuit applied well established case law to conclude that the plaintiffs did not have to wait until the statute was enforced against them to test its constitutionality since there was a credible threat of enforcement if they violated the ceiling on expenditures. Self-censorship was sufficient since plaintiff had been advised that the state would enforce the statute, and the statute suppressed a core activity protected by the First Amendment.

The loyalty oath cases upon which petitioner relies are also distinguishable (*see, Keyishian v. Board of Regents*, 385 U.S. 589, 604, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S. Ct. 1316, 12 L. Ed. 2d 377 (1964)). Both cases involved statutes which applied to all teachers, and required compliance or loss of employment. In addition, the Court in *Baggett* held that the oath was vague, making it more likely that the plaintiff would be more likely to restrict his speech rather than risk loss of employment. The Hearing Officer, the District Court, and the Second Circuit all found that the directive at issue is not vague, and that petitioner was provided with extensive guidance as to its proper parameters, undermining petitioner's chilling argument.

Nor is the decision below inconsistent with *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988) (Pet. 21-22). *Virginia* involved a pre-enforcement facial challenge to a criminal statute, and plaintiffs might have had to take significant and costly compliance measures under the statute or risk criminal prosecution, suffering harm based upon their *actual and well-founded fears*. Since there was a question as to the proper interpretation of the statute which might affect the outcome of the litigation, the Supreme Court certified the question to the Virginia Supreme Court for an interpretation of the statute since the Court did not want to address a constitutional issue without a definitive interpretation of the statute. Ultimately,

the case was vacated and remanded in light of the Virginia Supreme Court's interpretation of the statute (*Virginia v. American Booksellers Ass'n.*, 488 U.S. 905, 109 S. Ct. 254, 102 L. Ed. 2d 243 (1988)).

In striking contrast, the Second Circuit found that petitioner did not have well founded fears that were sufficient to meet the chilling requirements. Moreover, petitioner sought to litigate a broad range of hypothetical situations which had not been delineated. In addition, the Court rejected his facial challenge to the directive.

Contrary to his contention (Pet. 22), petitioner has not been placed on the horns of a grave dilemma without redress. Rather, petitioner has refused to distinguish between the "chilling" of his conduct which is clearly proscribed by the directive, and situations which he unreasonably asserts are covered by the directive, as to which no action has been taken or is reasonably threatened.

B. The Amended Complaint is Not Ripe

The Second Circuit also properly concluded that petitioner failed to present a ripe controversy with respect to the application of the directive to his off-campus communications with students on matters unrelated to the school curriculum. In so doing, the Court examined both the fitness of the issues for judicial decision and the hardship that would result if judicial consideration was withheld (*Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)). Pre-enforcement challenges must grow out of real substantial controversies between the parties which are defined and concrete (*see generally Gardner v. Toilet Goods Assoc.*, 387 U.S. 167, 87 S. Ct. 1526, 18 L. Ed. 2d 704 (1967) (courts must determine whether the resolution of the underlying legal issues would be facilitated if raised in the context of a specific

attempt to enforce the challenged provision)). Courts have been reluctant to intervene in conflicts which arise in the daily operation of public schools, and only do so for actual conflicts which "directly and sharply implicate constitutional values" (*Epperson v. Arkansas*, *supra* at 104).

Given the unique nature of student-teacher relationships, the Second Circuit noted that it was easy to imagine a variety of circumstances that might fall within the challenged hypothetical application of the directive, some of which may be regulated constitutionally, and some of which may not. Since BOCES had not threatened to apply the directive to any of petitioner's off-campus activities, the Second Circuit would have been forced to guess how BOCES might apply the directive and pronounce the validity of numerous possible applications of the directive, which were as of yet hypothetical. The litany of questions contained in the petition (Pet. 24) confirms the hypothetical nature of his amended complaint, and the wisdom of the Second Circuit's declination to answer his hypothetical questions.

The Court reached a similar conclusion with respect to petitioner's request to test the application of the directive to on-campus, after-class conversations with students on matters not related to the curriculum and his responses to student's requests for prayer. We do not dispute that BOCES has taken the position that petitioner should not pray with students and counsel them with respect to God and his personal religious beliefs at school. During oral argument, the Second Circuit explored various hypotheticals that might occur with respect to prayer and counseling on school grounds. It was clear during oral argument that the Second Circuit felt that even in this area, the issue should not be litigated in the abstract. It was influenced by the fact that there was no evidence that BOCES had or intended to enforce the directive in an illegal manner. There is no reason to disturb that judgment.

The Second Circuit's determination to affirm the denial of petitioner's application to amend his complaint must been viewed in the context of its rejection of petitioner's facial challenge to the directive on the ground that it was unconstitutionally vague and overbroad. Petitioner has abandoned his overbreadth argument (Pet. 21). His vagueness argument is also without merit, since the basic meaning of the directive is as clear as the context permits, and gives petitioner fair notice of what conduct is proscribed (*see, New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)). The Second Circuit properly held that BOCES was not obligated to articulate every imaginable situation that might fall within the directive's purview (*see, e.g, Ward v. Hickey, supra*).

The Second Circuit rejected petitioner's contention that BOCES had refused to provide any explanation of the term "instructional program", finding that it was not unreasonable for BOCES to view his initial request for clarification as insincere when received simultaneously with his signed affirmation that he would comply with the directive. The Court also relied upon the documented evidence that petitioner had been provided with extensive guidance regarding the ambit of the directive after returning to teaching from his suspension (Pet. App. 20-21). This effectively undermines petitioner's request for Supreme Court review of the Second Circuit's determination on chilling.

A barren record is not the appropriate case to address these issues. The Second Circuit's insistence on factual boundaries within which to adjudicate constitutional issues is predicated on sound jurisprudential principles.

III.

IT WOULD BE INAPPROPRIATE FOR THIS COURT TO CONSTRUCT CONSTITUTIONAL GUIDELINES TO GOVERN TEACHER COMMUNICATIONS WITH STUDENTS DURING NON-INSTRUCTIONAL TIME IN RESPONSE TO THE HYPOTHETICAL SITUATIONS PETITIONER HAS POSITED IN HIS AMENDED COMPLAINT.

Thus, this Court should reject petitioner's invitation to construct general guidelines for assessing the constitutional boundaries of teacher communications with students during non-instructional time. The Second Circuit properly declined petitioner's invitation.

Petitioner asks this Court to resolve the point at which a teacher sheds the imprimatur of the state when speaking to students (Pet. 23). While petitioner concedes that when a teacher speaks on matters concerning the curriculum, his speech is indelibly stamped with the state's imprimatur, and is subject to regulation (*Edwards v. Aguillard*, *supra*), he asserts that this Court has never suggested that the imposition of the state's imprimatur on a governmental employee is independent of the nature of the conversation and the nature of the relationship between the speaker and the listener (*citing*, *Lee v. Weisman*, *supra*; *Board of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226, 248-53, 110 S. Ct. 2356, 110 L. Ed. 2d 191 (1990); *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995)). Even if that were true, it is irrelevant to this case.

BOCES only regulated petitioner's speech insofar as it affected his instructional program, which clearly goes beyond the "curriculum" as petitioner has narrowly defined it (Pet. 23). BOCES has not intruded upon private relationships

which do not involve petitioner's instructional program. Petitioner's attempt to limit his public role to the mandated curriculum is contrary to well-settled Establishment Clause jurisprudence (*see, infra*, pp. 13-16), as well as Congress' recognition that a teacher's public role transcends the boundaries of classroom instruction (*see*, Equal Access Act, 20 U.S.C. § 4071[a]; *Board of Educ. of Westside Comm. Sch. v. Mergens*, *supra*). Since petitioner is not merely a private party in a public forum, neither *Capital Square Review Bd. v. Pinette,* (515 U.S. 753, 770, 115 S. Ct. 2440, 132 L. Ed. 2d 650 (1995)) or *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, (*supra*) afford him protection to advocate his religious views even in response to student initiated requests. Nor does *Rosenberger v. Rector and Visitors of the University of Virginia,* (*supra*) preclude BOCES's actions. BOCES did not engage in unconstitutional viewpoint discrimination since petitioner's speech was not private, and BOCES had legitimate Establishment Clause concerns.

Petitioner asks this Court to speak on matters that need no clarification for the boundaries of the proper role of public school teachers with respect to the instructional program and school activities are not amorphous. To the extent that open questions may exist about teachers' conduct outside of instructional matters and school activities, he seeks guidance well beyond this Court's jurisprudential limits. Accordingly, the petition should be denied.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS FROM BOCES'S BRIEF TO THE SECOND CIRCUIT

* * *

In addition, plaintiff undermined the behavior modification approach adopted by the team, and has either alienated or supplanted other professional members of the team raising serious concerns on the part of BOCES. There is no question that BOCES has an interest as an employer in regulating the expressive activity of its employees that differs significantly from those government possesses in regulating the expressive activities of its citizenry (*Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 [1994] [plurality opinion]; *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 [1968]). In determining whether the employer's interest in effective functioning is disrupted, courts examine whether the conduct impairs discipline, co-worker relations, or impedes the performance of the actor's duties, or the operation of the enterprise, among other factors (*Pickering v. Board of Educ.*, *supra*, 391 U.S. at 569-70). We submit that plaintiff's admitted defiance of the directive clearly undermined BOCES' educational objectives, impaired discipline, and undermined relations between co-workers.

* * * *